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IN THE

Supreme Court of the United States

No. 71-978

JAMES MICHAEL McCONNELL,
Petitioner,

vs.

ELMER L. ANDERSON, et al.,
Respondents.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTARY STATEMENT OF THE CASE

Petitioner's statement of the case is basically accurate, but requires amplification of the facts in this controversy upon which decisions of the Board of Regents and the Court of Appeals were based.

On May 18, 1970, Petitioner and one Jack Baker approached Dr. Hopp, the head librarian for the University, and advised Dr. Hopp that they, Petitioner and Mr. Baker, were going to apply for a marriage license. Dr. Hopp advised Petitioner that his appointment to the University Staff had not yet been approved [1] and that he could jeopardize approval by such actions.

[1] Petitioner's appointment was expressly made subject to the approval of Respondent Board of Regents. Petitioner, in his Complaint, alleged a contract of employment but following an evidentiary hearing dropped that claim. Pet. App. 2a, 16a.

This advice was ignored; three hours later Petitioner and Mr. Baker applied for a marriage license at the Hennepin County Clerk's office. At that time reporters for the news and television media were present and pictures were taken, Petitioner and Mr. Baker were interviewed, and the event received wide publicity. App., *infra.*, RA1-5. While Petitioner denied personally arranging for the presence of the news media at the Clerk's office, he testified he knew of others who might have done so. (Pet. App. 3a, 4a) It is a fair conclusion from the articles in the newspapers and the carefully posed pictures that Petitioner and Mr. Baker actively cooperated with the news media to insure the widest possible news coverage for the marriage license application.

McConnell and his attorneys requested and received a hearing before the Board's Faculty, Staff and Student Affairs Committee, at which they presented information they deemed supporting of his employment application. It should be noted that Petitioner makes no claim of denial of procedural due process. (Pet. App. 4a) Newspaper articles were introduced at the hearing before the District Court. Petitioner, upon reviewing them, affirmed the statements attributed to him and Mr. Baker, and information concerning them, were accurate.

As noted above, Petitioner's claim of an employment relationship with the University was dropped. Accordingly, this is not a case where "cause" for discharge must be shown by the employer. (Pet. App. 16a)

The District Court, in its order staying enforcement of its injunction pending appeal, made it clear that it viewed its order as requiring the Board to place Petitioner on the University Staff.

ARGUMENT

In his petition to this Court, Petitioner has raised five constitutional issues all of which are strenuously urged upon this Court as applicable and controlling upon his case. Such an approach is to be contrasted with Petitioner's brief filed with the Court of Appeals in which he conceded that the only issue on appeal was whether the action of the Regents represented arbitrary or capricious conduct.[2] By doing so, Petitioner necessarily conceded and recognized that none of the constitutional questions so vigorously pressed here actually existed in the case. Having lost on the question he conceded to be the only issue before the Court of Appeals, Petitioner suddenly raises numerous constitutional arguments. In fact, such issues are now being pressed upon this Court to the extent that the issue agreed by the Petitioner to be the *sole* issue for decision by the Court of Appeals is never even mentioned in the petition filed with this Court.

For the reasons hereafter stated, it is clear that Petitioner's position as to the *issue* before the Court of Appeals was correct. This case involves nothing more than a proper exercise of discretion by the Regents in determining that under the facts available to them it was not in the best interest of the University of Minnesota to hire the Petitioner.

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[2] Petitioner also specifically admitted in his oral argument before the Court of Appeals that the issue before the Court of Appeals was whether the action of the Regents was arbitrary or capricious.

Certiorari should not be granted to provide Petitioner a third judicial review of the facts supporting the Board's decision.

On July 9, 1970, the Faculty, Staff and Student Affairs Committee of the Board of Regents of the University of Minnesota met to consider the proposed appointment of Petitioner to the University Staff. Petitioner and his attorney were notified and appeared before the Committee.

At the Committee meeting, Petitioner and his attorney were advised of the fact that the Committee was considering a recommendation that Petitioner's appointment not be approved. Petitioner and his attorneys were given the opportunity to, and they did, reply and present any information they felt appropriate. Thereafter, the Committee considered all the facts, including publicity generated by the staged marriage license application,[3] the statements by Mr. McConnell

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[3] The publicity referred to above and considered by the Committee and the Board of Regents appeared in the daily newspapers in both St. Paul and Minneapolis and also in the *Minnesota Daily*, the University of Minnesota student newspaper.

The articles, received in evidence as Defendants' Exhibit "A", detail the Plaintiff's application for a license to marry a Mr. Jack Baker. The *St. Paul Pioneer Press* headlined its own version of the story on the marriage license application "Prospective Newlyweds Really in a Gay Mood." In the *Minnesota Daily* article Mr. Baker was identified as a first year law student at the University of Minnesota and Mr. McConnell as a "professional librarian" who expects to obtain a position in a local library soon. The *Daily* article also stated that "The 'gay' men, both 28 years old, *have lived together* for the past three years in Oklahoma, Kansas City and Minneapolis" (emphasis added). Later articles go on to describe the denial of the marriage license application and quote the opinion of the Hennepin County Attorney. Copies of all of these articles including the carefully posed pictures of the Plaintiff and Mr. Baker applying for the license are reproduced in the Appendix, *infra*, pp. RA1-5.

When Mr. McConnell and Mr. Baker arrived at the marriage license bureau, reporters and cameramen were already present. Needless to say the presence of the news media was not accidental. While Mr. McConnell denied that he personally notified the reporters, he admitted that he knew of others who might have done so. A review of the newspapers' articles discloses that the application for a marriage license was carefully staged to insure the widest possible newspaper coverage for the "event".

and his attorneys, and other relevant matters. The Committee then voted to recommend to the Regents that Petitioner's appointment not be approved. On July 10, 1970, at its regular monthly meeting, the Respondent Board of Regents adopted the recommendation by resolution.

Thereafter, Petitioner brought an action in Federal District Court seeking, among other relief, a mandatory injunction requiring the Board of Regents to employ Petitioner. Following an evidentiary hearing, the District Court issued an injunction requiring Respondents to employ Petitioner. The District Court's opinion is reproduced at 12a of Petitioner's appendix.

Respondents appealed the District Court's decision to the Eighth Circuit Court of Appeals contending that the standard of review of the Board's decision was whether it was arbitrary, unreasonable, and capricious. Petitioner, before the Court of Appeals, conceded both in his brief and in oral argument that the standard of review of the Board's decision was so limited. The Court of Appeals reviewed the full factual record and reversed the lower court's decision, saying:

> "It is our conclusion that the Board possessed ample specific factual information on the basis of which it could reasonably conclude that the appointment would not be in the best interests of the University. We need only observe that the Board was given the unenviable task and duty of passing upon and judging McConnell's application against the background of his actual conduct. So postured, it is at once apparent that this is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct." Pet. App. 6a, 7a

Petitioner here seeks yet another review of the Board's decision in applying to this Court for a Writ of Certiorari. Respondents submit that no conflicts exist between the decision of the Eighth Circuit Court of Appeals here and decisions by other Courts of Appeal, nor are any constitutional issues or important considerations presented by this case justifying the granting of a Writ of Certiorari. Rather, the case presents nothing more than a proper exercise of the Board's broad discretion in determining that hiring this particular individual under the particular facts present was not in the best interest of the University of Minnesota.

I. There is no conflict between the decision of the Eighth Circuit Court of Appeals in this case and decisions by the Court of Appeals for the District of Columbia or any other circuit.

Petitioner cites three decisions by the Court of Appeals for the District of Columbia, contending a conflict exists between those decisions and the Eighth Circuit Court of Appeals' decision in this case. However, Petitioner fails to specify any such conflict. Furthermore, a close examination of those cited cases reveals no such conflict in the decisions.

In *Adams v. Laird*, 420 F. 2d 230 (D. C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970), cited by Petitioner, the Secretary of Defense denied a "top secret" authorization of access to classified information to one Adams, such authorization being essential to Adams' employment as an electronics technician. Following summary judgment rendered by the District Court in favor of the Secretary of Defense, Adams appealed, alleging evidence concerning his homosexual activities was obtained or admitted under circumstances violative of due

process, asserting that the evidence was weighed under improperly articulated standards and complaining that no findings or conclusions were made to support the decision that granting of security clearance was not clearly consistent with the national interest. In short, Adams asserted a lack of procedural due process in obtaining evidence and specifying findings and conclusions. The Court of Appeals affirmed summary judgment in favor of the Secretary of Defense and against the Appellant, a homosexual, and, as noted above, a petition for certiorari was denied by this Court. No conflict with the instant case appears in the majority opinion.

Norton v. Macy, 417 F. 2d 1161 (D. C. Cir. 1969), involved the discharge of one Norton, a budget analyst employed by the National Aeronautics and Space Administration (NASA), for conduct of a homosexual nature. Norton, as a civil service employee, could be discharged only, as provided by statute, "for cause as would promote the efficiency of the service."

The Court of Appeals, in reviewing the discharge, stated the requirements of cause imposed by statute provided job security not enjoyed by unprotected federal employees since the requirement of cause imposed a higher duty on the government employer than merely abstaining from a violation of constitutional rights. The Court noted that Norton denied he was a homosexual, that apparently his fellow employees were unaware of his problem, and that "Appellant is at most an extremely infrequent offender who neither openly flaunts nor carelessly displays his unorthodox sexual conduct in public. Thus, even the potential for the embarrassment the agency fears is minimal." 417 F. 2d at 1167. Accordingly, the Court held that "cause" as required by the statute was not shown on the record before it. Again, no conflict between the decision in *Norton* and the instant case exists upon an examination of the facts.

Similarly, in *Scott v. Macy*, 402 F. 2d 644 (D.C. Cir. 1968), the third case cited by Petitioner, no conflict with the instant case exists. *Scott v. Macy* held that the Civil Service Commission was required to state the grounds on which it disqualified an applicant for federal employment, following the passing of competitive exams. The Court in *Scott v. Macy* held that where it was unclear as to which of two possible grounds provided the basis for disqualifying the applicant for employment by the Civil Service Commission, summary judgment sustaining the Commission's action would be reversed and the case remanded. Even *Ulrich v. Laird*, —— F. Supp. ——, 40 L.W. 2165 (D. D.C. Sept. 17, 1971) is not in point as that case involved the right of government investigators to question the applicant about his private activities.

Petitioner's reliance on *Norton v. Macy*, supra, as evidencing a conflict with the decision below is misplaced. What Petitioner fails to note is that the Court in *Norton* was dealing with a specific statutory prohibition against dismissal absent a showing of "cause as will promote the efficiency of the service." While the Court in *Norton* upon review of the facts determined the requirements of the statute had not been met, it clearly indicated its decision was limited to the facts before it, concluding its opinion by saying:

> "Lest there be any doubt, we emphasize that we do not hold that homosexual conduct may never be cause for dismissal of a protected federal employee. Nor do we even conclude that potential embarrassment from an employee's private conduct may in no circumstances affect the efficiency of the service. What we do say is that, if the *statute* is to have any force, an agency cannot support

> a dismissal as promoting the efficiency of the service merely by turning its head and crying 'shame'." 417 F. 2d at 1168 (emphasis added.)

Contrary to Petitioner's assertion, no conflict exists between the decision of the Eighth Circuit Court of Appeals in the instant case and decisions by the Court of Appeals for the District of Columbia. Decisions by other Circuit Courts of Appeals and the Court of Claims are also consistent with the instant case.[4] Accordingly, the petition should be denied.

II. No new questions of federal constitutional law are involved in this case nor has Petitioner been denied any constitutional right.

This case involves simply a review of the facts in the record to determine whether the Board's decision not to hire Petitioner was arbitrary, capricious and unreasonable, or, as stated by the Minnesota Supreme Court in a recent case, to determine whether there is room for two opinions on the matter, for "where there is room for two opinions on the matter, such action is not 'arbitrary and capricious' even though it may be believed that an erroneous conclusion has been reached." *Brown v. Wells*, 288 Minn. 468, 472, 181 N.W. 2d 708, 711 (1970). When the Board's decision was reviewed by the District Court this accepted standard of review of administrative action was neither acknowledged by the District Court nor adhered to in reviewing the Board's decision. On appeal to the

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[4] *See Schlegel v. United States*, 416 F. 2d 1372 (Ct. Cl. 1969) *cert. denied* 397 U.S. 1039 (1970); *Vigil v. Post Office Department of United States*, 406 F. 2d 921 (10th Cir. 1969); *Anonymous v. Macy*, 398 F. 2d 317 (5th Cir. 1968) *cert. denied* 393 U.S. 1041 (1969); *Taylor v. United States Civil Service Commission*, 374 F. 2d 466 (9th Cir. 1967).

Circuit Court, however, Petitioner conceded that the issue before the Court of Appeals was whether the Board's decision was arbitrary and capricious. The Circuit Court reviewed the entire record with this result:

> "It is our conclusion that the Board possessed ample specific factual information on the basis of which it reasonably could conclude that the appointment would not be in the best interests of the University."

While Petitioner now contends numerous constitutional issues are presented by this case, Respondents submit the questions posed find no support in the undisputed facts of this case.

A. Petitioner has not been denied due process, equal protection or freedom of speech.

Petitioner, in his "statement of questions presented," as well as in his varied constitutional rights arguments, refuses to recognize that the Board's decision was not a policy decision to exclude persons having homosexual propensities from employment. Petitioner also fails to acknowledge that he was not rejected because of his views expressed either publicly or privately. In short, Petitioner, in order to distill his asserted questions of constitutional rights, ignores the fact that the Board, exercising its conceded discretion, considered whether or not it would be in the best interests of the University to hire Petitioner, the applicant before it, taking into account that applicant's entire course of conduct.

The Board considered whether it would be in the best interests of the University to hire *this* homosexual, one who saw fit to stage a marriage license application insuring the widest possible publicity; who publicly proclaimed his intention to bring legal action to compel the issuance of a marriage license, making certain that the proposed lawsuit and the Plaintiff

would be kept before the public eye through the news media; who saw fit to publicly proclaim he had been "living" with Jack Baker, his proposed spouse, for a period of three (3) years; and who did all of the foregoing knowing that he was attempting to obtain a staff position with the University of Minnesota, a public educational institution supported by the taxpayers of Minnesota.

The man who was refused employment here made a public spectacle of himself. Furthermore, his statements and his conduct were such as to subject the University and those connected with it to ridicule, embarrassment and criticism. Moreover, the Regents had every reason to conclude that Plaintiff would be a source of embarrassment in the future. In short, everything about the Plaintiff could only serve to compel the conclusion that his hiring would prove to be nothing but a liability to the University of Minnesota.

Petitioner does not present a case of denial of employment for mere homosexual propensities nor for private clandestine conduct ferreted out by a prospective employer. The Petitioner here publicly announced he was a homosexual and that he was living with his intended spouse, Jack Baker. His actions in seeking a marriage license to "legalize" the relationship were designed to secure the maximum publicity for the event. Where as here Petitioner, himself, made his private conduct a matter of public knowledge and concern, he can hardly argue such conduct could not be considered by the Board in making its decision.[5]

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[5] As pointed out by Mr. Chief Justice Warren Burger, then circuit Judge, in his dissent in *Scott v. Macy*, 349 F. 2d 182 (D.C. Cir. 1965) contending the majority should decide the case on its merits:

> "Wisely or not, Congress, in common with a host of other law-making bodies, has defined as criminal the homosexual conduct stipulated to by appellant in his final appeal at the Commission. Whether it is sound legislative policy to attempt to deal with sex deviates under the criminal law is not open to judges, but

Neither does Petitioner present a case where he is denied employment because of his views expressed either publicly or privately. Rather, taken into consideration in Petitioner's rejection was a course of conduct described above which even the District Court was constrained to describe as "this rather bizarre occurrence."[6] In the context of this case, Petitioner's reliance on cases such as *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959), which involved prior censorship of movies by the State of New York, and *Brandenberg v. Ohio*, 395 U.S. 444 (1969), involving a criminal conviction under an Illinois criminal syndicalism act defining as a crime merely advocating the necessity of violence, is misplaced. Here, Petitioner presents no question of free speech present in the cases cited.[7]

This case viewed in its entirety presents no questions of due process, equal protection or free speech. It is no deprivation

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one can hardly doubt that such conduct is regarded as immoral under contemporaneous standards of our society. This Court is in no position, then, to overturn, or even to question an executive determination authorized by Congress that homosexual conduct warrants a disqualification from federal employment." 349 F. 2d at 189, 190.

[6] *Webster's Third New International Dictionary* defines "bizarre" as "being strikingly out of the ordinary or at variance with some standard, real or implied: As a: Not suited to the situation; esp: being at variance with good taste or accepted standards * * *."

[7] Contrary to the suggestion in Petitioner's statement of the case, the District Court did not express an opinion on Petitioner's so-called "symbolic speech" contention, other than to note "this might well be a useful argument to Plaintiff had he been arrested for some asserted law violation at the time of his attempt to secure a marriage license." Pet. App. 23a. As noted, Petitioner, in conceding there was but one issue before the Court of Appeals, necessarily recognized the absence of the issue now asserted in his petition. In Footnote 7 to its opinion (Pet. App. 7a) the Court of Appeals, referring to the question of "symbolic speech", observed that "although this contention is not pressed here, we feel constrained to observe that we do not believe that *Tinker* [*Tinker v. Des Moines Ind. School Dist.*, 393 U.S. 503 (1969)], when read in light of its distinctive facts, can afford McConnell any comfort in this regard".

of constitutional rights for an institution of higher learning to choose not to hire one whose deliberate intentional conduct is so bizarre as to be a probable source of embarrassment and ridicule to the prospective employer. To suggest that there was insufficient basis to support a conclusion that it would not be in the best interests of the University to hire the Plaintiff is to make mockery of the Regents' obligation to govern the University in the best interests of the students and the citizens of Minnesota. Accordingly the petition should be denied.

B. No question concerning invasion of Petitioner's privacy is presented by this case.

Petitioner's claim that the Board invaded his right to privacy is sheer nonsense. What Petitioner ignores is that he voluntarily and intentionally, and not by any action by the Board, saw fit to forego any privacy concerning his conduct, sexual and otherwise.

Griswold v. State of Connecticut, 381 U.S. 479, (1965), cited by Petitioner, indicated that the right of privacy provides protection "against all governmental *invasions* 'of the sanctity of a man's home and the privacies of life.'" 381 U.S. at 484, (emphasis added). Accordingly, in *Griswold* the Court struck down a criminal statute broadly proscribing the use of contraceptives as an invasion of the sanctity of marriage. Similarly, in *Mindel v. U.S. Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970), relied on by Petitioner, the Court found offensive the investigation by the Civil Service of the personal, private activities of the Plaintiff and on the basis of its investigation, removal of Plaintiff from his job for living with a woman without marriage.

The right of privacy, however, has not been extended to bar inquiry into every kind of conduct, or as here, consideration of conduct by Petitioner when Petitioner himself saw fit to make such conduct a public issue. As pointed out by Justice Harlan in his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), involving a prior attack on the Connecticut statutes struck down in *Griswold*,

> "The right of privacy most manifestly is not absolute. Thus I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal inquiry however privately practiced. So much has been explicitly recognized in acknowledging the state's rightful concern for its people's moral welfare. * * *
>
> Adultery, homosexuality and the like are sexual intimacies which the State forbid altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age has fostered and protected." 367 U.S. at 552, 553.

On the facts involved here, there was no invasion of Petitioner's right to privacy. The Board had every right to consider Petitioner's past, present, and future conduct in determining whether to hire Petitioner. The petition should be denied.

C. The Board's rejection of Petitioner did not constitute action "in the nature of" a bill of attainder.

As previously noted, and as recognized by the Eighth Circuit Court of Appeals, the Board had ample factual grounds on which they could conclude that the employment of Petitioner would not be in the best interests of the University of Minnesota. The Board, in its decision, did not, by legislative action, by adoption of regulations or otherwise, purport to declare a group of persons ineligible for employment. What the Board did consider is the admitted conduct by Petitioner, all the facts and circumstances surrounding Petitioner's conduct, including Petitioner's appetite for publicity, and made a determination not to hire Petitioner.

The suggestion that the Board's decision not to hire Petitioner constitutes a bill of attainder is not supported by the undisputed facts of this case, nor by the several decisions of this Court construing the constitutuional prohibition against bills of attainder. *See, e.g., United States v. Brown*, 381 U.S. 437, (1965); *United States v. Lovett*, 328 U.S. 303, (1946), Accordingly, the petition for certiorari should be denied.

CONCLUSION

For the reasons stated above, this case presents no questions justifying further judicial review. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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Prospective Newlyweds Really in a Gay Mood

P. Press 5/19/70

By ROGER BERGERSON
Staff Writer

Two homosexuals applied for a marriage license in Minneapolis Monday, the issuance of which, one said, would enable them to become the first men in the United States legally married to one another.

Jack Baker, 28, of 1139 SE. 15th Ave., Minneapolis, a member of FREE (Fight Repression of Erotic Expression) at the University of Minnesota, and James McConnell, 29, a Kansas City, Mo., librarian, filled out the form and paid the $10 application fee in Minneapolis city hall.

They were given courteous service by Robert Anderson, the city's senior deputy clerk and told they could pick up the license Friday, "unless there is a legal impediment."

Any impediment will be determined by Hennepin County Attorney George Scott who indicated later that he probably will advise against the issuance of the license.

"Without getting into the law at this point, I'll just say that it's my understanding that there should be a male and female involved," he said.

Baker, a law student, said he is prepared to wage a court fight against such a refusal.

He bases his contention that homosexuals may wed on the fact that it is not forbidden by Minnesota law, specifically statute 517.02, titled "marriages prohibited."

FREE members contend that homosexuals are entitled to the same rights enjoyed by heterosexuals and that possible procreation should not be used as a standard for the issuance of the license.

Baker said he and McConnell met in Norman, Okla., three years ago, hope to have a church wedding, preferably on Dec. 31 so that the reception can take the form of a New Year's Eve party.

Minneapolis Tribune Photo by R. Bertrand Heine

2 Men Apply for Marriage License

Two men applied for a marriage license Monday in Minneapolis, saying they plan to wed Dec. 31. Robert Anderson (left), senior deputy clerk of Hennepin County District Court, administered oaths to Jim McConnell, center, 28, a librarian from Kansas City, Mo., and Jack Baker, also 28, a law student at the University of Minnesota. Baker said Minnesota law does not forbid the marriage, but Anderson told them his office would ask the county attorney for advice, and County Atty. George Scott said later he would recommend denial of the license. Baker, past president of FREE, a campus organization seeking equal rights for homosexuals, said it was the first time to his knowledge that two homosexuals have applied for a marriage license.

THE MINNEAPOLIS TRIBUNE. Tuesday, May 19, 1970.

Homosexual marriage license denial urged

Hennepin County Atty. George M. Scott recommended Friday that an application by two men for a marriage license be denied.

Gerald R. Nelson, clerk of district court, said he intends to abide by Scott's recommendation and has "no intention of issuing the license."

The decision came as no surprise to Jack Baker, 28, University of Minnesota law student who applied for the license Monday with James McConnell, 28-year-old librarian from Kansas City, Mo.

Baker, a past president of FREE (Fight Repression of Erotic Expression), a campus group seeking equal rights for homosexuals, said, "We expected to go to court right from the beginning."

Constitution

He said he will seek a statutory and a constitutional interpretation, and said he believes that regardless what present law reads, his consitutional rights as a citizen are being violated if he is not allowed to marry as he wishes.

Speaking earlier Friday before a law forum at the university, Baker said he wanted to marry his partner because, "There is no reason I should be denied the full dignity of the law."

He said he also feels entitled to inheritance, property, income and other tax benefits enjoyed by married people.

The Legal Aid Clinic at the university is handling his case, Baker said.

Scott, in a seven-page legal opinion, cites numerous state statutes concerning marriage which make references to "man" and "woman," including one which specifies that a marriage license must be issued in the county in which the woman resides. Presumably, then, if no woman is involved, a license can't be issued.

State 'duty'

He also cites a 1949 ruling by the Minnesota Supreme Court which says the state is a third party to a marriage contract, and contends that "it is the duty of the state, in the conservation of public morals, to guard the (marriage) relation."

Scott states, "It is fundamental that the state has the exclusive rights concerning the law of the civil contract of marriage and the parties thereto." He said that to permit two males to marry would "result in an undermining and destruction of the entire legal concept of our family structure in all areas of law."

Inasmuch as Minnesota apparently has no law designed specifically to prevent men from marrying each other, Scott cites a state statute dealing with presumptions of legislative intent:

"In ascertaining the intention of the Legislature the courts may be guided by the following presumptions:

1) The Legislature does not intend a result that is absurd, impossible of execution, or unreasonable.

2) The Legislature intends to favor the public interest as against any private interest."

THE MINNEAPOLIS STAR. Saturday, May 23, 1970.

'Gay' Marriage Refusal Fought

Two homosexual males who were denied a license to be wed in Minneapolis have announced their intention to challenge the action in court prior to Aug. 1.

One of the parties involved, Jack Baker, 28, of 1139 — 15th Ave. SE., Minneapolis, said he was informed of the denial Saturday in a mailed notice signed by Gerald R. Nelson, clerk of Hennepin County District Court.

On Tuesday Baker received a copy of the seven-page legal opinion of Hennepin County Attorney George Scott which prompted the refusal.

"Scott's major point seemed to be that the marriage would make chaos of all the laws that speak in terms of husband and wife," Baker said.

Baker, a University of Minnesota law student and co-founder of FREE (Fight Repression of Erotic Expression) and James McConnell, 29, of Kansas City, Mo., have initiated the preparation of a legal brief which will seek a writ of mandamus forcing the marriage license approval.

ST. PAUL PIONEER PRESS. Wednesday, May 27,

970.

Apply for marriage license

Two homosexuals plan to wed

By NICK COLEMAN

Two male members of the University homophile organization FREE (Fight Repression of Erotic Expression) applied for a marriage license yesterday in the Hennepin County Court House.

The two men, Jack Baker and Jim McConnell, caused only a minor stir as they walked into the marriage license bureau and proceeded to make out an application. Slightly embarrassed reporters and photographers fluttered around them while most of the office workers stood in small clusters and tittered over what was occurring.

THE "GAY" MEN, both 28 years old, have loved together for the past three years in Oklahoma, Kansas City and Minneapolis. Baker is a first year law student at the University. McConnell is a "professional librarian" and expects to obtain a position in a local library soon. Baker is a past president of FREE.

As they finished filling out the application, they were asked by the clerk to swear to the authenticity of the information they had given. The clerk then clarified the situation for the benefit of the confused onlookers, saying, "You understand that this is only an application for a marriage license—not the license itself."

According to the clerk, "There will have to be a legal determination by the county attorney" in the case because there is no female involved. It usually takes about six days for a license to be granted and the FREE members were told that unless there is a "legal impediment" a license should be issued to them by Saturday.

BAKER INDICATED that he expects some hesitation on the part of county officials in issuing the license, but that he anticipates that it will ultimately be granted. The men plan to be married Dec. 31 and hold a celebration party on New Year's Eve.

Marriage licenses are only valid for six months after their issuance, which in this case would be May 23 if there are no problems. If that were to happen the license would expire before the scheduled date of the wedding. "I don't expect them," Baker said, "to give us the license before June 1."

While repeatedly announcing that they "expect no problems," the men were quick to assert their willingness to take the case into court. "If there's any legal hassle," Baker said, "we're prepared to take it all the way to the Supreme Court." Wielding a law book, Baker said that "the statutes are very clear. There's no mention at all of a marriage between people of the same sex. It's clearly not prohibited by the law."

IN A STATEMENT released by FREE, Baker and McConnell are said to be applying for a marriage license because they "hope to have their relationship recognized as an enduring and honest love unit."

"This is not a gimmick," Baker said, "we really want to do it. A homosexual ought to have equal rights, privileges and responsibilities." According to the FREE statement, "any relationship that promotes honesty, self-respect, mutual growth and understanding for two people and which harms no other person should be accepted by the law."

Baker said that it is a common occurrence for homosexuals in California to pledge themselves to each other ceremonially, but that what he and McConnell want is a "legally binding marriage." According to the men, such a marriage would be a "landmark case."

The betrothed, Jim McConnell and Jack Baker
The members of FREE fill out marriage license applications